IN THE

Supreme Court of the United States

October Term, 1978

No. 78-467

ENNTEX OIL & GAS COMPANY (OF NEVADA),
SPINDLETOP OIL & GAS COMPANY,
OKLAHOMA COAL & OIL COMPANY,
LA PRADA OIL & GAS COMPANY,
TEXAS COAL & ENERGY COMPANY,
PAUL E. CASH,
J. W. HEFLIN AND
JOE B. OWEN, Appellants

V.

THE STATE OF TEXAS, Appellee

ON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE
SIXTH SUPREME JUDICIAL DISTRICT
OF TEXAS, SITTING AT TEXARKANA, TEXAS

JURISDICTIONAL STATEMENT

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September 19, 1978

INDEX

CITATIONS

Cases:

Constitutions, Statutes & Rules:

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, sitting at Texarkana, Texas, entered December 13, 1977, affirming a judgment of the 14th Judicial District Court of Dallas County, Texas, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas sitting at Texarkana, Texas, is reported in 560 S.W.2d 494. Copies of the orders of the Supreme Court of Texas, denying appellants' application for writ of error to that Court and overruling their motion for rehearing of application for writ of error are unreported. Copies of the opinion of the Texarkana Court and the orders of the Supreme Court of Texas, are attached hereto as Appendix A.

JURISDICTION

This suit was originally brought under the Texas Securities Act [TEX.REV.CIV.STAT.ANN. art. 581 (1964)] by the State of Texas, seeking injuctive relief against appellants for failure to register certain securities sold by them with the Texas State Securities Board. The judgment of the 14th Judicial District Court of Dallas County, Texas, granting such relief was entered January 24, 1977, and notice of appeal to the Court of Civil Appeals for the Fifth Supreme District of Texas, sitting at Dallas, Texas, was made February 18, 1977, by appellants filing a cost bond. [TEX.R.CIV.PRO.354]. The case was subsequently transferred to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, sitting at Texarkana, Texas. [TEX.REV.CIV.STAT.ANN. art. 1738 (Supp. 1978)]. On December 13, 1977, the Court of Civil Appeals rendered its opinion affirming the judgment of the district court and finding that the actions of the Texas Securities Board were not violative of the Constitution of the United States. Appellants' motion for rehearing was overruled on January 24, 1978. Appellants made application for writ of error to the Supreme Court of Texas [TEX.R.CIV.PRO. 467 & 468], and such application was refused on the grounds of no reversible error without written opinion on May 24, 1978. Their motion for rehearing on application for writ of error was overruled by the Supreme Court of Texas on June 21, 1978. Notice of appeal to this Court was filed in the Supreme Court of Texas on September 13, 1978, and in the Court of

Civil Appeals on September 14, 1978. The jurisdiction of the Supreme Court to review this decision by direct appeal is confirmed by 28 U.S.C. §1257(2). The decision in *Dahnke-Walker Milling Company v. Bondurant*, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239 (1921) sustains the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case.

QUESTIONS PRESENTED

Where sales of fractional undivided interests in oil and gas leases were exempted from registration under the Securities Act of 1933, by the filing of offering statements pursuant to Schedule D of Regulation B to such act and the sellers thereof were located in the State of Texas, but all purchasers of such interests were located in states other than Texas, does the requirement of registration of such interests with the Texas State Securities Board constitute an unreasonable burden on interstate commerce and thus violate the commerce clause of the Constitution of the United States.

Where the Securities Commission of the State of Texas initially does not require registration of offerings sold to investors outside the State of Texas, later changes that position without notice and then applies the Texas Securities Act to some sellers and not to others, does such action constitute an application of the Texas Securities Act in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

STATUTES INVOLVED

Sections 4A, 4E, 7A and 32 [TEX.REV.CIV.ANN. art. 581-4A, 4E, 7A&32 (1964)] are set forth in Appendix B hereto.

STATEMENT

The record in this case has been brought forward from both the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, sitting at Texarkana, Texas [hereinafter referred to as the "Court of Civil Appeals"], and the Supreme Court of Texas. The record is arranged in volumes designated "A" through "P," volumes "A" through "M" being the record from the Court of Civil Appeals, volume "N" being various orders and certifications from both lower courts, and volumes "O" and "P" being appellants' application for writ of error and motion for rehearing in the Supreme Court of Texas. All references herein will be to this certified record by volume and page number.

Corporate appellants, EnnTex Oil & Gas Company (of Nevada) ["EnnTex"], Oklahoma Coal & Oil Company ["Oklahoma Coal"], LaPrada Oil & Gas Company ["LaPrada"] and Texas Coal & Energy Company ["Texas Coal"] are all corporations either organized and existing under the laws of the State of Texas or authorized by the Secretary of State to do business within the State of Texas. Each was engaged in the sale of fractional undivided interests in oil and gas leases to the public at large. Such interests are securities as that term is defined by the Securities Act of 1933, and the Securities Exchange Act of 1934. [15 U.S.C. §77b(1) & 15 U.S.C. §78c(10)].

Each offering, however, was exempt from registration with the Securities and Exchange Commission pursuant to Schedule D of Regulation B to the 1933 Act. [17 C.F.R. §230.310 (1977)]. To avail themselves of this exemption from registration, each company filed an offering sheet containing information required by the Securities and Exchange Commission with the Commission on each offering made.

From these offerings, capital was raised to drill wells seeking oil and gas on the leases so sold.

While although each company had its office physically located within the State of Texas, the leases sold were within the State of Texas and the drilling and producing of the wells occurred within Texas, no sales were made to Texas residents and

no offers of sale were made to Texas residents. Each ultimate fractional owner, with the exception of any interest retained by the selling company, thus resided in a state other than Texas.

Corporate appellant Spindletop Oil & Gas Company was a successor in interest to EnnTex Oil & Gas Company (of Texas), a sales company not a party here, but did not conduct any sales itself. It merely assumed operation of the producing wells drilled by EnnTex (of Texas) and other companies, and acted as an operating company, operating the wells, paying expenses out of the production, and forwarding the net revenues to the individual interest owners.

Individual appellants Paul E. Cash ["Cash"] and Jerry W. Heflin ["Heflin"] each owned one-third of the corporate stock of LaPrada, Oklahoma Coal and Texas Coal. Each also owned forty-one percent of the stock of Southern Bankers Investment Company (not a party here), which in turn owned ;one hundred percent of Spindletop. EnnTex was wholly owned by Spindletop. Cash and Heflin thus had control of the corporate appellants. [17 C.F.R.§230.405 (1977].

Appellant Owen owned one-third of the stock of LaPrada.

The various companies made sales pursuant to offering sheets filed with the Securities and Exchange Commission from early 1974, until the fall of 1975, when appellants were restrained and enjoined from further sales by the institution of this action. None of the offerings were registered with the Securities Commission of the State of Texas.

On November 20, 1975, the Attorney General of Texas, instituted two separate actions in state district court in Dallas County, Texas, against EnnTex, LaPrada, Cash, Heflin, Owen and others alleging that the sales conducted were in violation of the Securities Act of the State of Texas [TEX.REV.CIV.STAT.ANN. art 581 (1964)] in that they had not been registered with the State Securities Board. [R.VOL.A.21,60]. On December 19, 1975, a similar action was instituted against Texas Coal. [R.VOL.A.54]. Temporary restraining orders were entered in each case restraining and enjoining further sales. [R.VOL.A.15,29,51]. On February 4, 1976, the Attorney General amended his pleadings to name

Oklahoma Coal, Spindletop and others as additional defendants. [R.VOL.A.81]. After consolidation [R.VOL.A.32,78] and transfer to the 14th Judicial District Court of Dallas County, Texas [R.VOL.A.100], appellants amended their answer to raise the constitutional arguments brought forward here. [R.VOL.A.112].

After trial, a final judgment of permanent injunction, was entered against appellants. [R.VOL.A.117].

On appeal to the Court of Civil Appeals, appellants raised these arguments in their points of error I and II. [R.VOL.J.5-17]. These points were specifically reached, discussed and rejected by the Court of Civil Appeals:

> Accordingly, appellants' contention that the Texas Securities Act, as it applies to them, violates the interstate commerce clause of the United States Constitution is overruled.

560 S.W.2d 494,497; R.VOL.N.5.

> [Appellants] urge that the [Texas Securities] Act, as applied to them, in unconstitutional inasmuch as the Securities Commissioner did not attempt to regulate "Schedule D" companies and offerings prior to August 20, 1975, and that after that date, the Securities Commissioner was inconsistent in seeking relief against the various "Schedule D" companies operating in the State of Texas. We must overrule appellants' contention.

560 S.W.2d 494,497; R.VOL.N.5-6.

After the Court of Civil Appeals rejected appellants' arguments, they were again raised in that court on motion for rehearing [R.VOL.M.3-9], but this motion was overruled on January 24, 1978. [R.VOL.N.9].

The points were brought to the attention of the Supreme Court of Texas by way of application for writ of error to the Court of Civil Appeals. [R.VOL.O.8-22]. The Supreme Court without oral argument or written opinion, rejected appellants' application for writ of error. [R.VOL.N.15].

Appellants again presented their constitutional arguments on motion for rehearing [R.VOL.P.4-6], but rehearing was denied on June 21, 1978. [R.VOL.N.15].

THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this appeal bring before this Court for determination the question of where regulation of securities sales by the state constitute an undue burden on interstate commerce.

The statutes drawn in question here [TEX.REV. CIV.STAT.ANN. art. 581-4A, 4E, 7A & 32 (1964)] are not unconstitutional on their face. It is the construction and application given them by the State of Texas and its application to these appellants which brings them into conflict with the commerce, due process and equal protection clauses of the Constitution. The validity of these statutes as applied to appellants herein has been sustained by the courts below. Jurisdiction under 28 U.S.C. §1257(2) is thus sustained on the basis that the courts below have held that the statutes may be applied and enforced in the manner desired by the State of Texas. In *Dahnke-Walker Milling Company v. Bondurant*, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239 (1921) this Court exercised jurisdiction where the state courts held that a particular transaction was intrastate rather than interstate therefore holding the statute valid.

Appellants do not contend that the several states may not regulate the sales of securities within their own boundaries. This power is specifically recognized within the body of the Securities Act of 1933 itself. Section 18 of the Act provides:

> Nothing in this subchapter shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any state or territory of the United States, or the District of Columbia, over any security or any person.

15 U.S.C. §77v.

This provision has remained unchanged since its enactment in 1933, and clearly gives a state the right to regulate sales of securities within its boundaries.

The Texas Securities Act states that "the terms 'sale' or 'offer for sale' or 'sell' shall include every disposition, or attempt to dispose of a security for value." It goes on to define the term "sell" to include "any act by which a sale is made" and to encompass in the term "sale" or "offer for sale" "a subscription,

an option for sale, a solicitation of sale, a solicitation of an offer to buy, an attempt to sell, or an offer to sell, directly or by an agent or salesman, by a circular, letter, or advertisement or otherwise, including the deposit in a United States Post Office or mail box or in any manner in the United States mails within this state of a letter, circular or other advertising matter." [TEX.REV. CIV.STAT.ANN. art 581-4E (1964)].

This provision is not dissimilar to those of other states which have enacted so-called Blue Sky Laws.

The fractional undivided interests in oil and gas leases sold by appellants are securities under the Texas Securities Act. [TEX.REV.CIV.STAT.ANN. art 581-4A (1964)]. This is likewise not an unusual provision in state acts.

The question thus becomes at what point and to what extent can a state regulate sales of securities which are sold in interstate commerce, and not run afoul of the commerce clause of the Constitution of the United States.

In other words, if securities are being sold to citizens of one state by citizens of another, to what extent may the states involved regulate these sales.

The particular situation presented here involves Texas, but the question is one of nationwide importance, and therefore is of substantial impact on regulatory authorities and sellers of securities in all states.

The fact that this case involves the sale of a particular type of security, oil and gas leases, is not important, as the question presented reaches the sale of any and all securities, regardless of their nature.

Texas has taken the position that "the seller may be any link in the selling process or in the words of the Act he is one who performs 'any act by which a sale is made.'" *Brown v. Cole*, 155 Tex. 624, 291 S.W.2d 704, 708 (1956).

Other Texas cases have indicated that the Texas Securities Act is to be given the broadest possible scope. "Clearly the outstanding purpose of this Act is for the protection of the public." *Kadane v. Clark*, 135 Tex. 496, 143 S.W.2d 197, 199 ("940); *Fowler v. Hults*, 138 Tex. 636, 161 S.W.2d 478 (1942);

Flowers v. Dempsey-Tegeler & Company, 472 S.W.2d 112 (Tex. 1971).

In 1974, the Texas Securities Act was held applicable in a situation which is the reverse of that presented here. The investor was located in Texas, and the seller was located in Arizona. The offer to sell and solicitation were made by the way of long distance telephone communication. *Shappley v. State*, 520 S.W.2d 766 (Tex. Crim. 1974). This holding is in accord with this Court's holding in *Travelers' Health Association v. Virginia*, 339 U.S. 643 70 S.Ct. 927, 94 L.Ed. 1154 (1950).

Travelers' Health Association upheld the power of the Commonwealth of Virginia to regulate the solicitation and sale of securities to residents of Virginia by a company located in the State of Nebraska.

It is submitted to this Court that *Travelers' Health Association* correctly defines the scope and breadth of Section 18 of the 1933 Act. [15 U.S.C. §77v]: the several states may constitutionally regulate sales of securities to their citizens.

Of greater significance, however, is whether the several states may cause their laws to be applied *not* to protect their citizens, but to regulate the manner in which sales are made to the citizens of other states. This is a question of sufficient magnitude to merit examination by this Court.

There can be no doubt that the regulations by Texas of sales to residents of other states affects and burdens interstate commerce. The question is whether such regulation is of such extent and burden to *unconstitutionally* affect interstate commerce.

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to putative local benefits.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174, 178 (1970).

The Court should determine whether the action of Texas in attempting to regulate sales beyond her borders to nonresidents is excessive in relation to any putative local benefits inuring to citizens of Texas.

That a state may regulate *dispositions* within its borders and not infringe on the commerce clause of the constitution has been long recognized. *Hall v. Geiger-Jones Company*, 242 U.S. 539, 37 S.Ct. 224, 61 L.Ed. 480 (1917); *Caldwell v. Sioux Falls Stockyard Company*, 242 U.S. 559, 37 S.Ct. 224, 61 L.Ed. 493 (1917); *Merrick v. N. W. Halsey & Company*, 242 U.S. 568, 37 S.Ct. 227, 61 L.Ed. 498 (1917). In these cases, decided the same day, this Court examined and affirmed the power of a state to regulate the disposition of securities to its citizens from out of state sources.

It now falls to this Court to determine whether interstate commerce is burdened by regulation by a state when the security is not disposed of within the state. Texas has created an undue burden on interstate commerce by asserting that the broad, general language of *Brown v. Cole, supra,* concerning "any link in the selling chain," allows it to regulate dispositions in other states. *See also, Rio Grande Oil Company v. State*, 539 S.W.2d 917 (Tex. Civ. App.—Houston 1976, writ ref'd n.r.e.).

In *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174, 178 (1970), this Court stated:

> If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities

It is clear from the previous rulings of this Court, and from section 18 of the Securities Act of 1933, that the several states have a legitimate interest in regulating the sale of securities within their borders. Of substantial importance to the securities commerce of this nation is the breadth of legitimate local state interest. If, as Texas asserts, this interest is present if "any link in the selling chain" falls within the state, there can be no interstate commerce, as the securities laws of each state vary in their registration requirements.

The situation is analogous to that where a state has required certain kinds of processing of a product before it could be shipped to a sister state. In *Shafer v. Farmers' Grain Company of Embden*, 268 U.S. 189, 199, 45 S.Ct. 481, 485, 69 L.Ed. 909, 915 (1925) this Court had before it a North Dakota statute relating to the inspection and grading of wheat and requiring a grading license before a buyer could buy by grade. In striking down the statute as being a direct burden on interstate commerce, the Court applied the rule "that a state statute which by its necessary operation directly interferes with or burdens [interstate] commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted." *See also, Pike v. Bruce Church, Inc., supra*, and the cases cited therein. 397 U.S. at 142, 90 S.Ct. at 844, 25 L.Ed.2d at 178.

The Texas regulatory scheme has decreed that if any link in the selling chain falls within Texas, the product (securities) must be "processed" and altered to meet requirement which may not be imposed in the state of ultimate sale. This is a direct burden on the interstate sales of securities.

Texas has attempted to obscure this fact by presuming jurisdiction on the basis that the purpose of the Texas Securities Act is to prevent fraud. *Flowers v. Dempsey-Tegeler & Company, Fowler v. Hults, Kadane v. Clark, Rio Grande Oil Company v. State, supra.* The Court of Civil Appeals in the instant case likewise relies on this purpose to grant the Securities Commissioner virtually unlimited jurisdiction. 560 S.W.2d 494 at 497; R.VOL.N. 5.

It is submitted that this logic, while noble, is in direct conflict with the right to do business in interstate commerce. The states to which the securities flow are best able to protect their citizens from fraudulent practices through the enforcement of their own registration and licensing laws.

During the last term of this Court, there was presented the question of the powers of a state to regulate the dumping within its boundaries of waste which originated in other states. Local concerns were allowed access to disposal sites, but out of state concerns were not. *City of Philadelphia v. New Jersey*, — U.S. —, 98 S.Ct. 2531, — L.Ed.2d — (1978). The case, while not similar to this case factually, is similar in import. This Court found that there was no preemption of state law by federal legislation. Such is the case here. This Court found, however, that

"[t]he dispositive question, therefore, is whether the law is constitutionally permissible in light of the Commerce clause of the Constitution." — U.S. at —, 98 S.Ct. at 2534, — L.Ed.2d at —.

The question presented here is of equal importance to the relationship and scope of state and federal regulating bodies' concurrent jurisdiction and how that jurisdiction is controlled by the commerce clause of the Constitution. It is submitted that this Court has an obligation to periodically review the scope of state regulatory agencies' authority to regulate and control interstate commerce within their borders and advise them, by written opinion, as to their jurisdiction. To refuse to do so results in local agencies continually increasing their jurisdiction. This is what Texas has clearly done in the series of appellate decisions culminating in the instant case. This Court, should for the benefit of all state regulatory agencies, determine this question.

Directly tied to the commerce clause aspects of this case, and illustrating the results of unbridled regulatory powers, are the actions of the Securities Commissioner of the State of Texas which led to the institution of this litigation. It is submitted that these actions caused the Securities Act of the State of Texas to be applied to appellants in a manner violative of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

From the testimony of Roy Mouer, Securities Commissioner of the State of Texas, it is ascertained that prior to August 20, 1975, securities sold from within the state to residents of other states, did not need to be registered. [R.VOL.C.322].

No announcement of this policy was made to the public. [R.VOL.C.323]. The Commissioner went on to state that prior to August 20, 1975, if an offeror was selling outside the State of Texas without submitting the securities, he was not in violation of the policy of the Board. [R.VOL.C.325]. Thus, prior to August 20, 1975, appellants, and those similarly situated, pursuant to Texas State Securities Board policy, were not violating the Texas Securities Act, but subsequent to that date they were. While no notice was given to the public of this shift, some offerors were advised that action was about to be taken against them. [R.VOL.C.343-344]. Further, administrative actions in the nature of cease and desist orders were sought against some offerors. [R.VOL.C.343]. The Attorney General was requested to bring injunctive actions against approximately thirty companies and fifty individuals for selling unregistered securities in the nature of Schedule D offerings. [R.VOL.C.342]. Appellants fall into the category of those against whom injunctive relief was sought. It is undisputed that no notice was given them prior to the institution of each of the suits involved in the instant case [R.VOL.A.18,29,51]. It is likewise undisputed that no administrative action was instituted against any of appellants.

The Securities Commissioner therefore selectively singled out which entities would be warned, which entities would be ordered administratively to cease and desist, and which entities would be sued. This constitutes the application of the Texas Securities Act in an unqeual manner.

This presents a question of substantial federal importance for this Court, as the effect of the Commissioner's actions deprives appellants for five years of their opportunity to seek exemption from registration of future offerings of securities under Regulation A of the Securities Act of 1933. [17 C.F.R. §230.252(4)(1977)].

The Commissioner has arbitrarily determined who will be allowed to avoid injunctions and who will not. By doing so, he has determined who will be allowed to exempt securities offerings from federal registration and who will not.

Can he apply the law unequally and not run afoul of the rights of appellants and others to equal protection under the Constitution and due process of law before their right to seek such an exemption is taken? Of crucial importance to the public is the question of the right of a state regulatory body to deny a federally provided right by its own administrative action.

To further illustrate the evils of allowing a state regulatory body absolute control over items in interstate commerce once they touch the borders of the particular state is the Securities Commissioner's own admission that he had examined the offering sheets of appellants and would not register them if presented. [R.VOL.C.317]. Even though all sales expenses were disclosed, he found them too high. He has thus determined that regardless of the laws of the state to which the securities were directed, and

regardless of the fact that the offering sheets conformed to federal regulations, he would not allow them sold. Attempts at regulation would be hopeless.

This action not only burdens interstate commerce by completely removing the item from the flow, but further results in the denial to appellants of their rights to equal protection and due process under the Fourteenth Amendment to the Constitution.

This action alone is of substantial federal importance.

It is submitted that the decision of the Court of Civil Appeals in upholding the action of the district court results in allowing the application of the Securities Act of the State of Texas to appellants and others in a manner which is violative of the commerce clause of the Constitution and which further denies appellants and others their Constitutional right to equal protection of and due process under the laws of the United States. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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APPENDIX A

APPENDIX A

Court of Civil Appeals
Sixth District
Texarkana, Texas

Enntex Oil & Gas Company (Of Nevada), Et Al--------Appellants	)	Appealed from the 14th
No. 8516 v.	)	Judicial District Court
The State of Texas-- Appellee	)	of Dallas County, Texas

Enntex Oil & Gas Company (of Nevada), Spindletop Oil & Gas Company, Oklahoma Coal & Oil Company, Laprada Oil & Gas Company, Texas Coal & Energy Company, Paul E. Cash, J. W. Heflin and Joe B. Owen, appeal from a judgment entered in the 14th Judicial District Court of Dallas County, Texas, permanently restraining and enjoining them from, "In any way, and by any manner or means either or (sic) directly or indirectly, promoting, issuing, selling, offering to sell, negotiating for sale, advertising, dealing or distributing securities, including but not limited to, instruments representing interest in or under oil or gas leases or investment contracts within or from within the State of Texas, without complying with the registration and licensing requirements of Section 7(A)(1) and (12) of Article 581 V.C.S." Appellee, The State of Texas, acting by and through its Attorney General and at the specific request of its Securities Commissioner, applied for the permanent injunction ultimately entered alleging, inter alia, that the appellants offered to sell, sold, issued and dealt in and with securities, namely certificates representing interest in or under oil, gas and mining leases, without complying with the licensing and registration requirements of the Securities Act of

Texas, Tex. Rev. Civ. Stat. Ann. art. 581-1, et seq. The judgment from which the appeal has been perfected was entered based on a finding that appellants offered for sale and did sell, issue and deal in and with securities, namely certificates or an instrument representing an interest in or under an oil, gas or mining lease, without complying with the Securities Act of Texas, Tex. Rev. Civ. Stat. Ann. art. 581-1, et seq. Appellants, with the exception of Spindletop Oil & Gas Company, do not allege that the evidence fails to support the fact findings of the trial court upon which the permanent injunction was predicated. Spindletop Oil & Gas Company does assert herein that there is no evidence in the record that it violated the Texas Securities Act, Tex. Rev. Civ. Stat. Ann. art. 581-1, et seq. The pivotal issues to be resolved on appeal pertain to appellants' allegations that their dealings and activities were solely in interstate commerce and any regulation thereof by appellee would be an unreasonable restraint on interstate commerce and that appellee applied the Texas Securities Act against them in a manner which violated their rights of equal protection and due process under the Constitutions of the United States and the State of Texas.

Enntex Oil & Gas Cmpany (of Nevada), Oklahoma Coal & Oil Company, Laprada Oil & Gas Company, and Texas Coal & Energy Company, were corporations organized for the purpose of selling undivided interests in oil and gas leases located within the State of Texas. They were either incorporated in the State of Texas or doing business in the State of Texas pursuant to certificates of authority issued by the Secretary of State of Texas. These appellants, in furtherance of their corporate purpose, through solicitations normally originated in Texas, sold undivided interests in oil and gas leases located in Texas to non-residents of Texas. An offering sheet describing the interests to be offered for sale was filed with the Securities and Exchange Commission of the United States pursuant to Schedule D of Regulation B promulgated by said Commission pursuant to the Securities and Ex-

change Act of 1933. Each offering sheet bore the following caveat on its first page:

> "THE SECURITIES AND EXCHANGE COMMISSION HAS NEITHER APPROVED NOR DISAPPROVED THE INTERESTS HEREBY OFFERED AND IT IS A CRIMINAL OFFENSE TO REPRESENT THAT THE COMMISSION HAS APPROVED SUCH INTERESTS OR PASSED UPON THEIR MERITS OR VALUE OR HAS MADE ANY FINDING THAT THE STATEMENTS IN THIS OFFERING SHEET ARE CORRECT."

Companies such as the corporate appellants and their offerings are commonly referred to as "Schedule D's" because of the nomenclature of the form filed with the Securities and Exchange Commission of the United States. A "Schedule D" filing is in fact an exemption from registration under the Securities and Exchange Act of 1933. All oil and gas leases offered for sale were located in the State of Texas. The Appellants did not make any sales to Texas residents; however, monies derived from sales to non-residents of Texas were sometimes received in Texas and deposited to bank accounts maintained in Texas. The offering sheets filed with the Securities and Exchange Commission of the United States and mailed to potential investors were prepared in Texas and mailed to potential investors from the State of Texas. It is noteworthy that in many instances the only non-Texas aspect of the corporate activities was the location of the investor. Those appellants engaged in sales scrupulously avoided making sales to Texas residents.

Joe B. Owen owns 33⅓% of the issued and outstanding stock of Laprada Oil & Gas Company. Paul E. Cash and J. W. Heflin each own 33⅓% of the issued and outstanding stock of Oklahoma Coal & Oil Company, Laprada Oil & Gas Company and Texas Coal & Energy Company. Furthermore, Paul E. Cash and J. W. Heflin each own 41% of the issued and outstanding

stock of Southern Bankers Investment Company which own 100% of the issued and outstanding stock of Spindletop Oil & Gas Company. Spindletop Oil & Gas Company owns 100% of the issued and outstanding stock of Enntex Oil and Gas Company (of Nevada). The record is silent as to the identity of the owner or owners of the remaining 18% of Southern Bankers Investment Company stock, and the remaining 33⅓% of Texas Coal & Energy Company stock and Oklahoma Coal & Oil Company stock; however, Paul E. Cash and J. W. Heflin could, acting in concert, control the activities of all corporate appellants.

It is not suggested that appellants' activities qualified as "exempt transactions" under Tex. Rev. Civ. Stat. Ann. art. 581-5 or that the securities offered (undivided interests in oil and gas leases located within the State of Texas) were "exempt securities" under Tex. Rev. Civ. Stat. Ann. art. 581-6. Article 581-4(E) provides that:

> "The terms 'sale' or 'offer for sale' or 'sell' shall include every disposition, or attempt to dispose of a security for value. The term 'sale' means and includes contracts and agreements whereby securities are sold, traded or exchanged for money, property or other things of value, or any transfer or agreement to transfer, in trust or otherwise. Any security given or delivered with or as a bonus on account of any purchase of securities or other thing of value, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been sold for value. *The term 'sell' means any act by which a sale is made*, and the term 'sale' or 'offer for sale' shall include a subscription, an option for sale, a solicitation of sale, a solicitation of an offer to buy, an attempt to sell, or an offer to sell, directly or by an agent or salesman, by a circular, letter, or advertisement or otherwise, including the deposit in a United States Post Office or mail box or in any manner in the United States mails within this state of a letter, circular or other advertising matter. Nothing herein shall limit or diminish the full meaning of the terms 'sale,' 'sell' or 'offer for sale' as used by or accepted in courts of law or equity. The sale of a security under conditions which entitle

the purchaser or subsequent holder to exchange the same for, or to purchase some other security, shall not be deemed a sale or offer for sale or such other security; but no exchange for or sale of such other security shall ever be made unless and until the sale thereof shall have been first authorized in Texas under this Act, if not exempt hereunder, or by other provisions of law. Provided, however, advertising when made in compliance with Section 22 shall not be deemed a sale." (Emphasis added.)

The Securities Act regulates sellers and sales. *Brown v. Cole*, 155 Tex. 624, 291 S.W.2d 704 (1956); *Fowler v. Hults*, 138 Tex. 636, 161 S.W.2d 478 (1942); *Lewis v. Davis*, 145 Tex. 468, 199 S.W.2d 146 (1947). It applies if the seller is any link in the chain of the selling process. *Brown v. Cole*, supra; *Rio Grande Oil Co. v. State*, 539 S.W.2d 917 (Tex. Civ. App. Houston—1st Dist. 1976, writ ref'd n.r.e.). It is obvious from an examination of the quoted portion of the Securities Act and the holdings in the cited cases that the Securities Act applies to appellants and their sales activities even though the purchasers, who are not regulated by the Act, were non-residents of the State of Texas. The question thus presented is whether or not such regulation is an unreasonable restraint on interstate commerce in violation of the United States Constitution. A state statute affecting interstate commerce will be upheld where the statute regulates evenhandedly to effectuate a legitimate local public interest and its effects on interstate commerce are incidental unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Pike v. Bruce Church*, 397 U.S. 137, 25 L.Ed.2d 174, 90 S.Ct. 844 (1970); *Juron Portland Cement Co. v. Detroit*, 362 U.S. 440, 4 L.Ed.2d 852, 80 S.Ct. 813 (1960). A state is damaged if its citizens are permitted to engage in fraudulent practices even though those injured are outside its borders. *Rio Grande Oil Co. v. State*,

supra. Clearly, the State of Texas has a legitimate local public interest in taking precautions that oil and gas leases covering its lands are not the subject of fraudulent security practices. The Texas Securities Act, Tex. Rev. Civ. Stat. Ann. art. 581-1, et seq, only applies to disposition of securities within the state and accordingly, only incidentally touches interstate commerce. The incidental burden on interstate commerce created by the Act is insubstantial and not unreasonable. *Shappley v. State*, 520 S.W.2d 766 (Tex.Crim. App. 1974). The incidental burden imposed upon interstate commerce in this case is not excessive when compared in relation to the putative local benefits. Accordingly, appellants' contention that the Texas Securities Act, as it applies to them, violates the interstate commerce clause of the United States Constitution is overruled.

Appellants concede that the Texas Securities Act, Tex. Rev. Civ. Stat. Ann. art. 581-1, et seq, is not in and of itself violative of the constitutional safeguards of equal protection and due process; however, they do urge that the Act, as applied to them, is unconstitutional inasmuch as the Securities Commissioner did not attempt to regulate "Schedule D" companies and offerings prior to August 20, 1975, and that, after that date, the Securities Commissioner was inconsistent in seeking relief against the various "Schedule D" companies operating in the State of Texas. We must overrule appellants' contention. The Texas Securities Act, Tex. Rev. Civ. Stat. Ann. art. 581-1, et seq, as written is capable of uniform enforcement. The fact that a law may not be invoked against others could not in anywise affect its constitutionality because invoked against those such as appellants. *Ex Parte Boman*, 160 Tex. Cr. R. 148, 268 S.W.2d 186 (1954). It was held in *Super X Drugs of Texas v. State*, 505 S.W.2d 333 (Tex. Civ. App. Houston—14th Dist. 174, no writ), that:

> "... More must be shown than mere unequal application of a state statute to prove a violation of the equal protection clause of the fourteenth amendment to the United States Constitution. It is not sufficient to show only that the law is enforced against some and not others. There must be a showing of actual and purposeful discrimination against the individual himself or

against a suspect classification in which he falls (such as wealth, religion, or race), with no proper justifying governmental purpose in such classification . . . ."

Appellants have not shown, or attempted to show that they were actually and purposefully discriminated against by the State of Texas in these proceedings and we hold that their constitutional rights have not been violated.

Spindletop Oil & Gas Company urges that it did not violate the Texas Securities Act, Tex. Rev. Civ. Stat. Ann. art. 581-1, et seq. because it did not engage in any sales activities. Spindletop Oil & Gas Company is a wholly owned subsidiary of Southern Bankers Investment Company which in turn is controlled by Paul E. Cash and J. W. Heflin. Spindletop Oil & Gas Company owns all the issued and outstanding stock of Enntex Oil & Gas Company (of Nevada). Spindletop Oil & Gas owned all of the issued and outstanding stock of Enntex Oil & Gas Company (of Texas); however, prior to the instant litigation, Enntex Oil & Gas Company (of Texas) was dissolved with its parent, Spindletop Oil & Gas Company, acquiring all of its assets. Enntex Oil & Gas Company (of Texas) was a "Schedule D" company and actively engaged in selling undivided interests in oil and gas leases located in the State of Texas to nonresidents of the State of Texas. Upon dissolution, its assets vested in its parent, Spindletop Oil & Gas Company. It had producing wells at the time of dissolution. The ownership of the wells was vested in the out-of-state investors and Spindletop Oil & Gas Company as the successor to the interests of Enntex Oil & Gas Company (of Texas). The term "dealer" as defined by Tex. Rev. Civ. Stat. Ann. art. 581-4(C) includes:

". . . every person or company, other than a salesman, who engages in this state, either for all or part of his or its time, directly or through an agent, in selling, offering for sale or delivery or soliciting subscriptions to or orders for, or undertaking to dispose of, or to invite offers for, or rendering services as an investment adviser, *or dealing in any other manner in any security or securities* within this state . . . ." (Emphasis added.)

By managing the wells drilled by Enntex Oil & Gas Company (of Texas) which were owned jointly with out-of-state investors as a result of "Schedule D" offerings, Spindletop Oil & Gas Company became a "Dealer" under the Texas Securities Act, Tex. Rev. Civ. Stat. Ann. art. 581-1, et seq, irrespective of the fact that it did not attempt to sell any securities. It was dealing with securities which should have been licensed and regulated under the Act. The trial court found as a fact that Spindletop Oil & Gas Company dealt with securities and such finding supports the permanent injunction entered against it. Enntex Oil & Gas Company (of Texas) should have registered the securities (undivided interests in oil and gas leases) with the Securities Commissioner when it originally disposed of them. The securities were at the time of disposition, and are now, subject to regulation. Regulation cannot be avoided simply by a wrongdoer such as Enntex Oil & Gas Company (of Texas) transferring its assets.

Joe B. Owen and J. W. Heflin assert that the court had no jurisdiction to enter the permanent injunction against them because they were not served with process. This assertion is made even though they filed an answer in the trial court and appeared in this Court. By answering, these appellants entered an appearance in these proceedings thereby dispensing with the necessity for the issuance for service of citation upon them. Tex. R. Civ. P. 121.

The judgment of the trial court is affirmed.

Stephen Oden
Associate Justice

December 13, 1977
Filed December 13, 1977

JUDGMENT

BE IT REMEMBERED that on Tuesday the 13th day of December, A. D. 1977, the Court of Civil Appeals for the

Sixth Supreme Judicial District of Texas met in the City of Texarkana. Present William J. Cornelius, Chief Justice, C. L. Ray, Jr., Associate Justice, Stephen Oden, Associate Justice, and Louise Waldrop Lohse, Clerk, when the following proceedings, among others, were had, to-wit:

Enntex Oil & Gas Company (Of Nevada), Et al--------Appellants	)	Appealed from the 14th
No. 8516 v.	)	Judicial District Court
The State of Texas--Appellee	)	of Dallas County, Texas

THIS CAUSE came on to be considered on the transcript of the record, the statement of facts, and upon the briefs and oral argument of the parties; and the Court, after considering the same, is of the opinion and finds there was no error in the judgment of the Court below.

It is accordingly CONSIDERED, ORDERED AND ADJUDGED that the judgment of the trial court be, and it is hereby, in all things AFFIRMED, in conformity with the written opinion of this Court of even date on file herein; that appellants Enntex Oil & Gas Company (of Nevada), Spindletop Oil & Gas Company, Oklahoma Coal & Oil Company, Laprada Oil & Gas Company, Texas Coal & Energy Company, Paul E. Cash, J. W. Heflin and Joe B. Owen and the surety upon their appeal bond, The Travelers Indemnity Company, shall pay all costs in this behalf expended, both in this Court and the Court below, for which let execution issue; and that this judgment be certified to the Court below for observance.

BE IT REMEMBERED that on Monday the 23rd day of January, 1978, the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas met in the City of Texarkana, Texas. Present William J. Cornelius, Chief Justice, C. L. Ray, Jr., Associate Justice, Stephen Oden, Associate Justice, and Louise Waldrop Lohse, Clerk.

When the following proceedings, among others, were had to-wit:

It is ordered by the Court that the following styled and numbered motions be and they are hereby submitted as follows:

77-217:8516	Enntex Oil & Gas Company (of Nevada), Et Al v. The State of Texas	Dallas

Appellants' Motion for Rehearing

— 0 — 0 — 0 — 0 — 0 — 0 —

BE IT REMEMBERED that on Tuesday the 24th day of January, A. D. 1978, the Court of Civil Appeals for the Sixty Supreme Judicial District of Texas met in the City of Texarkana, Texas. Present William J. Cornelius, Chief Justice, C. L. Ray, Jr., Associate Justice, Stephen Oden, Associate Justice, and Louise Waldrop Lohse, Clerk.

When the following proceedings, among others, were had to-wit:

Enntex Oil & Gas Company (of Nevada), Et Al		Appealed from a District
No. 77-217:8516	v.	Court of Dallas County.
The State of Texas		

This cause came on to be heard on Appellants' Motion for Rehearing and the Court having inspected and duly considered said motion is of the opinion that the said motion should be and the same is hereby OVERRULED.

No. B-7434

IN THE SUPREME
COURT OF TEXAS

- - - - -

ENNTEX OIL & GAS COMPANY (NEVADA) ET AL

vs.

THE STATE OF TEXAS

- - - - -

Certified copy of Order of the Supreme Court of Texas. (Application for Writ of Error REFUSED—N. R. E.)

— — — —

IN THE SUPREME COURT OF TEXAS

- - - - - -

No. B-7434 May 24, 1978

ENNTEX OIL & GAS COMPANY (OF NEVADA) ET AL	)	From	DALLAS County,
vs.	)		
THE STATE OF TEXAS	)		SIXTH District,

Application of petitioners for writ of error to the Court of Civil Appeals for the SIXTH Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Corut of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicants, Enntex Oil & Gas Company (of Nevada) et al., and their surety, The Travelers Indemnity Company, pay all costs incurred on this application.

- - - - - -

No. B-7434 June 21, 1978

ENNTEX OIL & GAS COMPANY (OF NEVADA) ET AL	)	From	DALLAS County,
vs.	)		
THE STATE OF TEXAS	)		SIXTH District.

Petitioners' motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

- - - - - -

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 14th day of SEPTEMBER, 1978.

GARSON R. JACKSON, Clerk

By /s/ Judith E. Sullivan, Deputy.
Judith E. Sullivan

IN THE
COURT OF CIVIL APPEALS
FOR THE
SIXTH SUPREME JUDICIAL DISTRICT
OF TEXAS
SITTING AT TEXARKANA, TEXAS

ENNTEX OIL & GAS COMPANY (OF NEVADA), SPINDLETOP OIL & GAS COMPANY, OKLAHOMA COAL & OIL COMPANY, LA PRADA OIL & GAS COMPANY, TEXAS COAL & ENERGY COMPANY, PAUL E. CASH, J. W. HEFLIN AND JOE B. OWEN, Appellants	§	
V.	§	No. 8516
THE STATE OF TEXAS, Appellees	§	

NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES

Notice is hereby given that EnnTex Oil & Gas Company (of Nevada), Spindletop Oil & Gas Company, Oklahoma Coal

& Oil Company, La Prada Oil & Gas Company, Texas Coal & Energy Company, Paul E. Cash, J. W. Heflin and Joe B. Owen, the appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, sitting at Texarkana, Texas, affirming the judgment of the 14th Judicial District Court of Dallas County, Texas, entered in this action on the 13th day of December, 1977.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

KAMMERMAN, YEAKEL AND OVERSTREET
1420 AmericanBank Tower
Austin, Texas 78701
(512) 474-6436

By /s/ Earl L. Yeakel, III
EARL L. YEAKEL, II

ATTORNEYS FOR APPEALLANTS

PROOF OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the above and foregoing Notice of Appeal was served on the attorney of record for the Appellee, Mr. Bill Flanary, Assistant Attorney General, by mailing same to him, certified mail, return receipt requested, at P. O. Box 12548, Capitol Station, Austin, Texas 78711, this 12th day of September, 1978.

/s/ Earl L. Yeakel, III
EARL L. YEAKEL, III

B-7434

IN THE
SUPREME COURT
OF THE
STATE OF TEXAS

ENNTEX OIL & GAS COMPANY (OF NEVADA) SPINDLETOP OIL & GAS COMPANY, OKLAHOMA COAL & OIL COMPANY, LA PRADA OIL & GAS COMPANY, TEXAS COAL & ENERGY COMPANY, PAUL E. CASH, J. W. HEFLIN AND JOE B. OWEN, Petitioners	§	
V.	§	NO. B-7434
THE STATE OF TEXAS, Respondent	§	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that EnnTex Oil & Gas Company (of Nevada), Spindletop Oil & Gas Company, Oklahoma Coal & Energy Company, La Prada Oil & Gas Company, Texas Coal & Energy Company, Paul E. Cash, J. W. Heflin and Joe B. Owen, the petitioners abovenamed, hereby appeal to the Supreme Court of the United States from final judgment of the Supreme Court of Texas, denying Petitioners Motion for Rehearing and Application for Writ of Error to review the decision of the Court of Civil Appeals for the Sixth Supreme

Judicial District of Texas, sitting at Texarkana, Texas, entered in this action on the 21st of June, 1978.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

KAMMERMAN, YEAKEL AND OVERSTREET
1420 AmericanBank Tower
Austin, Texas 78701
(512) 474-6436

By /s/ Earl L. Yeakel, III
EARL L. YEAKEL, III

ATTORNEYS FOR PETITIONERS

PROOF OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the above and foregoing Notice of Appeal was served on the attorney of record for the Respondent Mr. Bill Flanary, Assistant Attorney General, by mailing same to him, certified mail, return receipt requested, at P. O. Box 12548, Capitol Station, Austin, Texas 78711, this 12th day of September, 1978.

/s/ Earl L. Yeakel, III
EARL L. YEAKEL, III

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing page contains a true and correct copy of NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES, in the case of ENNTEX OIL & GAS COMPANY (OF NEVADA) ET AL. v. THE STATE OF TEXAS, No. B-7434, from Dallas

County, Sixth District as the original of same appears of record on file in this office.

IN TESTIMONY WHEREOF, Witness my hand and the seal of the Supreme Court of Texas at the City of Austin, on this 14th day of September, 1978.

/s/ Garson R. Jackson
Garson R. Jackson, Clerk

APPENDIX B

APPENDIX B

TEXAS REVISED CIVIL STATUTES ANNOTATED— ARTICLE 581-4A (1964)

The term "security" or "securities" shall include any share, stock, treasury stock, stock certificate under a voting trust agreement, collateral trust certificate, equipment trust certificate, preorganization certificate or receipt, subscription or reorganization certificate, note, bond, debenture, mortgage certificate or other evidence of indebtedness, any form of commercial paper, certificate in or under a profit sharing or participation agreement, certificate or any instrument representing any interest in or under an oil, gas or mining lease, fee or title, or any certificate or instrument representing or secured by an interest in any or all of the capital, property, assets, profits or earnings of any company, investment contract, or any other instrument commonly known as a security, whether similar to those herein referred to or not. Provided, however, that this definition shall not apply to any insurance policy, endowment policy, annuity contract, optional annuity contract, or any contract or agreement in relation to and in consequence of any such policy or contract, issued by an insurance company subject to the supervision or control of the Board of Insurance Commissioners when the form of such policy or contract has been duly filed with the Board as now or hereafter required by law.

TEXAS REVISED CIVIL STATUTES ANNOTATED— ARTICLE 581-4E (1964)

The terms "sale" or "offer for sale" or "sell" shall include every disposition, or attempt to dispose of a security for value. The term "sale" means and includes contracts and agreements whereby securities are sold, traded or exchanged for money, property or other things of value, or any transfer or agreement to transfer, in trust or otherwise. Any security given

or delivered with or as a bonus on account of any purchase of securities or other thing of value, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been sold for value. The term "sell" means any act by which a sale is made, and the term "sale" or "offer for sale" shall include a subscription, an option for sale, a solicitation of sale, a solicitation of an offer to buy, an attempt to sell, or an offer to sell, directly or by an agent or salesman, by a circular, letter, or advertisement or otherwise, including the deposit in a United States Post Office or mail box or in any manner in the United States mails within this state of a letter, circular or other advertising matter. Nothing herein shall limit or diminish the full meaning of the terms "sale," "sell" or "offer for sale" as used by or accepted in courts of law or equity. The sale of a security under conditions which entitled the purchaser or subsequent holder to exchange the same for, or to purchase some other security, shall not be deemed a sale or offer for sale of such other security; but no exchange for or sale of such other security shall ever be made unless and until the sale thereof shall have been first authorized in Texas under this Act, if not exempt hereunder, or by other provisions of law. Provided, however, advertising when made in compliance with Section 22 shall not be deemed a sale.

TEXAS REVISED CIVIL STATUTES ANNOTATED— ARTICLE 581-7A (1964)

Qualification of Securities.

(1) No dealer, agent or salesman shall sell or offer for sale any securities issued after September 6, 1955, except those which shall have been registered by Notification under subdivision B or by Coordination under subdivision C of this Section 7 and except those which come within the classes enumerated in subdivisions A to R, both inclusive, of Section 5 of this Act, or subdivision A to K, both inclusive, of Section 6 of this Act, until the issuer of such securities or a dealer registered under the provisions of this Act shall have been granted a permit by the Commissioner; and no such permit shall be granted by the Commissioner until the

issuer of such securities or a dealer registered under the provisions of this Act shall have filed with the Commissioner a sworn statement verified under the oath of an executive officer or partner of the issuer, or of such registered dealer, and attested by the secretary or partner thereof, setting forth the following information:

a. The names, residences and post office addresses of the officers and directors of the company;

b. The location of its principal office and of all branch offices in this State, if any;

c. A copy of its articles of incorporation or partnership or association, as the case may be, and of any amendments thereto, if any; if a corporation, a copy of all minutes of any proceedings of its directors, stockholders or members relating to or affecting the issue of said security; if a corporation, a copy of its bylaws and of any amendments thereto; if a trustee, a copy of all instruments by which the trust is created and in which it is accepted, acknowledged or declared;

d. A statement showing the amount of capital stock, if any, and if no capital stock, the amount of capital of the issuer that is contemplated to be employed; the number of shares into which such stock is divided, or if not divided into shares of stock, what division is to be made or is contemplated; the par value of each share, or if no par stock, the price at which such security is proposed to be sold; the promotional fees or commissions to be paid for the sale of same, including any and all compensation of every nature that are in any way to be allowed the promoters or allowed for the sale of same; and how such compensation is to be paid, whether in cash, securities, service, or otherwise, or partly of either or both; also, the amount of cash to be paid, or securities to be issued, givem, transferred or sold to promoters for promotion or organization services and expenses, and the amount of promotion or organization services and expenses which will be assumed or in any way paid by the issuer;

e. Copies of certificates of the stock and all other securities to be sold, or offered for sale, together with application blanks therefor; a copy of any contract it proposes to make concerning such security; a copy of any prospectus or advertisement or other

description of security prepared by or for it for distribution or publication;

f. A detailed statement prepared in accordance with generally accepted auditing standards and procedures and generally accepted accounting principles, showing all the assets and all the liabilities of the issuer, said statement to reflect the financial condition of the issuer on a day not more than ninety (90) days prior to the date such statement is filed. Such statement shall list all assets in detail and shall show how the value of such assets was determined, that is, whether the value set forth in said statement represents the actual cost in money of such assets, or whether such value represents their present market value, or some other value than the actual cost in money, and shall show the present actual value of said assets; also, whether the value set forth in the statement is greater or less than the actual cost value in money and greater or less than the present market value of such assets. If any of the assets consist of real estate, then said statement shall show the amount for which said real estate is rendered for State and county taxes, or assessed for taxes. If any such assets listed shall consist of anything other than cash and real estate, same shall be set out in detail so as to give the Commissioner the fullest possible information concerning same, and the Commissioner shall have the power to require the filing of such additional information as he may deem necessary to determine whether or not the true value of said assets are reflected in the statement filed. Should any of the assets listed in said statement be subject to any repurchase agreement, or any other agreement of like character, by the terms of which the absolute ownership of, or title to said assets is qualified or limited in any way, then the terms and conditions of said agreement by which the absolute ownership of, or title to said assets is qualified or limited, as well as the amount and character of the assets subject thereto shall be fully stated. Said statement shall list all current liabilities, that is, all liabilities which will mature and become due within one year from the date of such application, and shall list separately from such current liabilities, all other liabilities, continent or otherwise, showing the amount of those which are secured by mortgage or otherwise, the assets of the issue which

are subject to such mortgage, and the dates of maturity of any such mortgage indebtedness. Such application shall also include a detailed profit and loss statement, prepared in accordance with generally accepted auditing standards and procedures and generally accepted accounting principles, which shall cover the last three (3) years' operations of the issuer, if such issuer has been in operation for three (3) years, but if not, said profit and loss statement shall cover the time that said issuer has been operating. If said issuer has not been operating, but is taking over a concern of any kind which has been previously operating, then a financial and profit and loss statement showing the operations of the concern thus taken over for a period of the last three (3) years next preceding the taking over of said concern shall be included in said statement; said profit and loss statement shall clearly reflect the amount of net profit or net loss incurred during each of the years shown. As amended Acts 1963, 58th Leg., p. 473, ch. 170, § 12a.

TEXAS REVISED CIVIL STATUTES ANNOTATED— ARTICLE 581-32 (1964)

Whenever it shall appear to the Commissioner either upon complaint or otherwise, that in the issuance, sale, promotion, negotiations, advertisement or distribution of any securities within this state, including any security embraced in the subsection of Section 6, and including any transaction exempted under the provisions of Section 5, any person or company who shall have employed, or is about to employ any device, scheme or artifice to defraud or to obtain money or property by means of any false pretense, representation or promise, or that any such person or company shall have made, makes or attempts to make in this state fictitious or pretended purchases or sales of securities or shall hvae engaged in or is about to engage in any practice or transaction or course of business relating to the purchase or sale of securities which is in violation of law or which is fraudulent or which has operated or which would operate as a fraud upon the purchaser any one or all of which devices, schemes, artifices, fictitious or pretended purchases, or sales of securities, practices,

transactions and courses of business are hereby declared to be and are hereafter referred to as fraudulent practices; or that any person or company is acting as dealer or salesman within this state without being duly registered as such dealer or salesman as provided in this Act, the Commissioner and Attorney General may investigate, and whenever he shall believe from evidence satisfactory to him that any such person or company has engaged in, is engaged in, or is about to be engaged in any of the practices or transactions heretofore referred to as and declared to be fraudulent practices, or is selling or offering for sale any securities in violation of this Act or is acting as a dealer or salesman without being duly registered as provided in this Act, the Attorney General may, on request by the Commissioner, and in addition to any other remedies, bring action in the name and on behalf of the State of Texas against such person or company and any other person or persons heretofore concerned in or in any way participating in or about to participate in such fraudulent practices or acting in such violation of this Act, to enjoin such person or company and such other person or persons from continuing such fraudulent practices or engaging therein or doing any act or acts in furtherance thereof or in violation of this Act. In any such court proceedings, the Attorney General may apply for and on due showing be entitled to have issued the court's subpoena requiring the forthwith appearance of any defendant and his employees, salesmen or agents and the production of documents, books and records as may appear necessary for the hearing of such petition, to testify and give evidence concerning the acts or conduct or things complained of in such application for injunction. The District Court of any county, wherein it is shown that the acts complained of have been or are about to be committed, shall have jurisdiction of any action brought under this section, and this provision shall be superior to any provision fixing the jurisdiction or venue with regard to suits for injunction. No bond for injunction shall be required of the Commissioner or Attorney General in any such proceeding. Acts 1957, 55th Leg., p. 575, ch. 269, § 32.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

* * *

NO. 78-467

* * *

ENNTEX OIL & GAS COMPANY (OF NEVADA), SPINDLETOP OIL & GAS COMPANY, OKLAHOMA COAL & GAS COMPANY, LA PRADA OIL & GAS COMPANY, TEXAS COAL & ENERGY COMPANY, PAUL E. CASH, J.W. HEFLIN AND JOE B. OWEN,

Appellants

V.

THE STATE OF TEXAS,

Appellee

* * *

ON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS, SITTING AT TEXARKANA, TEXAS

* * *

MOTION TO DISMISS OR AFFIRM

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

BILL FLANARY
Assistant Attorney General
701 Commerce Street, Suite 200
Dallas, Texas 75202

Counsel for Appellee,
The State of Texas

October 18, 1978

INDEX

CITATIONS

STATUTES, RULES AND REGULATIONS

ATTORNEY GENERAL OPINIONS

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

* * *

NO. 78-467

* * *

ENNTEX OIL & GAS COMPANY (OF NEVADA), SPINDLETOP OIL & GAS COMPANY, OKLAHOMA COAL & GAS COMPANY, LA PRADA OIL & GAS COMPANY, TEXAS COAL & ENERGY COMPANY, PAUL E. CASH, J.W. HEFLIN AND JOE B. OWEN,

Appellants

V.

THE STATE OF TEXAS,

Appellee

* * *

ON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS, SITTING AT TEXARKANA, TEXAS

* * *

MOTION TO DISMISS OR AFFIRM

* * *

TO THE SUPREME COURT OF THE UNITED STATES:

NOW COMES THE STATE OF TEXAS, Appellee, and pursuant to Rule 16, Rules of the Supreme Court, moves the Court to dismiss Appellants' appeal because the questions raised on appeal do not present a

substantial federal question for review, or, alternatively, to affirm the judgment of the court below.

Appellee agrees with the "Statement" contained in appellants' "Jurisdictional Statement" on file herein.

ARGUMENT AND AUTHORITIES

REQUIRING THE APPELLANTS TO REGISTER WITH THE STATE OF TEXAS THEIR SECURITIES SOLD EXCLUSIVELY TO NON-RESIDENTS OF TEXAS DOES NOT CREATE AN EXCESSIVE BURDEN ON INTERSTATE COMMERCE IN VIOLATION OF THE INTERSTATE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION, AND, THEREFORE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION FOR REVIEW.

All of the Appellant companies engaged in and sold fractional interests in oil and gas leases located in Texas from within Texas. Telephone solicitations from Texas were made to potential investors throughout the United States. Investors were instructed to send their money to Texas. Letters and offering sheets were mailed to investors from Texas. The offering sheets were "put together" and printed in Texas. The wells were drilled in Texas. The bank accounts were maintained in Texas into which investor money was deposited. Even Appellants state that it is beyond dispute that there was activity with regard to the sales of the Schedule D interests within the State of Texas by all the Appellants. [Appellant of course contends that Spindletop was the exception because of its "unique position"].

The *ONLY* "non-Texas" aspect of Appellants' operation was the location of the *INVESTOR*. No sales were made to Texas residents.

Any discussion of the impact of state securities

regulation on interstate commerce must begin, as did TEX. ATT'Y. GEN. OP. NO. O-3193 (1941), (attached hereto as Appendix A), with the understanding that Congress has not acted to preempt this regulatory field. Indeed, to the contrary, Congress specifically stated in the Securities Act of 1933, that "[n]othing [herein] shall affect the jurisdiction of the securities commission. . .of any state. . . over any security or any person." 15 U.S.C. §77r (1964). This fact, coupled with an analysis of the cases that had dealt with and rejected Commerce Clause attacks on state blue sky laws, led the Attorney General to conclude that whether a Wyoming company desiring to use Texas as a base to sell Schedule D oil and gas interests was involved in interstate commerce was "immaterial" to the question of whether it was required to register its salesmen and securities in Texas.

Similarly, the court in *Shappley v. State*, 520 S.W.2d 766, 772 (Tex.Crim.App. 1957) rejected the defendant's Commerce Clause contention, emphasizing that the conduct sought to be regulated occurred primarily in the state only incidentally touched interstate commerce:

> Without any attempt to dispose of securities within a state, there is no regulation. Such reasoning is sound and supports the announced purpose of the [Securities] Act--to protect the public from fraud and imposition by those engaged in selling worthless securities. [citation omitted]. We, therefore, hold that any incidental burden on interstate commerce created by the Act is insubstantial and not unreasonable.

Likewise, the Ohio court in *Brown v. Market Developments, Inc.*, 322 N.E.2d 367, 374, (Ohio C.D. 1974), held the application of the Ohio Consumer Protection law to an Ohio corporation selling only to non-Ohions "does not impose an undue burden on

interstate commerce." The court specifically noted Ohio's clear and valid interest in promoting fair consumer practices and in regulating unfair consumer practices." (Id.) The interest of the State of Texas as evidenced in the Securities Act is strikingly similar: "to provide a more efficient means of preventing fraud in sales of securities." *Fowler v. Hults*, 138 Tex. 636, 161 S.W.2d 478, 481 (1942). The facts of the instant case make particularly important the Texas Supreme Court's explanation of the history of the Texas Securities Act and the evil it was designed to remedy. In *Kadane v. Clark*, 135 Tex. 496, 143 S.W.2d 197, 199 (1940), the Court said:

> The history relating to the sale of securities in this State is well known. The development of the oil industry emphasized the necessity of regulating sales of securities issued on oil leases and other instruments relating to the oil business. An enormous number of worthless securities were sold to the public, and nothing was realized on many of these investments by the buyers. There was no restraint upon such sales nor upon those who made them. The public was notoriously imposed upon, and ofttimes people were defrauded out of their life savings. There was a public demand for protection against such sales. The legislature sought to cope with the situation by enacting the Securities Act.

Appellants' constitutional attack upon the Act, like their efforts to wriggle from its broad, encompassing language is unavailing. The State's interest in regulating the securities market is obviously valid. It is well within its police power, and only incidentally affects interstate commerce. The broad and remedial Texas Securities Act, designed as it is to advance this interest, "should be given the widest possible scope".

Flowers v. Dempsey-Tegeler, 472 S.W.2d 112, 115 (Tex. Sup. 1971). Appellants' contorted and misleading construction of the Act is in derogation of the remedial policy of the Act and should be by this Court, rejected.

Appellants' basic argument is that the Texas Securities Act simply does not apply whenever a Texas company deals with out-of-state residents. The argument is pressed even further to suggest that such an interpretation would render the Act unconstitutional as an unreasonable hinderance to interstate commerce. It is very simply an argument too weighty to stand.

First, such an argument is totally at odds with the plain language of the Securities Act itself. TEX. REV. CIV. STAT. ANN. art. 581-7(1964) provides that no dealer, agent, or salesman shall "sell or offer for sale any security" that has not been registered. Similarly, TEX. REV. CIV. STAT. ANN. art. 581-12(1964) declares that no person, firm, corporation, or dealer "shall, directly or through agents or salesmen, offer for sale, sell or make a sale of any securities in this state without first being registered as in this Act provided." The Act then defines "sale", "offer for sale", and "sell" in the broadest possible terms:

> . . . shall include every disposition, or attempt to dispose of a security for value. The term "sale" means and includes contracts and agreements whereby securities are sold, traded or exchanged for money, property or other things of value, or any transfer or agreement to transfer, in trust or otherwise.* * * The term "sell" means any act by which a sale is made, and the term "sale" or "offer for sale", shall include a subscription, an option for sale, a solicitation for sale, a solicitation for an offer to buy, an attempt to sell or an offer to sell, directly or by an agent or salesman, by a

> circular, letter, or advertisement or otherwise, including the deposit in a United States Post Office or mail box or in any manner in the United States mails within this state of a letter, circular or other advertising matter. Nothing herein shall limit or diminish the full meaning of the terms "sale", "sell", or "offer for sale" used by or accepted in courts of law or equity . . . TEX. REV. CIV. STAT. ANN. art. 581-4E (1964)

The definition of "dealer", in turn, embraces, *inter alia*, anyone who is "offering for sale", or "selling" securities. TEX. REV. CIV. STAT. ANN. art. 581-4C (1964). Likewise, the injunction provision authorizes court action against any "person or company [that] has engaged in, is engaged in, or is about to be engaged in . . . fraudulent practices, or is selling or offering for sale any securities in violation of this Act or is acting as a dealer or salesman without being duly registered. . . " TEX. REV. CIV. STAT. ANN. art. 581-32 (1964).

It is further clear that the Act is to apply if *any act* in the selling process occurs within Texas. This was precisely the holding of the Houston Court of Civil Appeals in *Rio Grande Oil Co. v. State*, 539 S.W. 2d 917 (Tex. Civ. App.-Houston 1976, writ ref'd. n.r.e.). Rio Grande Oil Company was a schedule D company operating out of Houston, Texas, selling only to out-of-state residents, just as the Appellants here.

Appellants have stated that a "key to the Court's [Houston Court of Civil Appeals] ruling appears to be the finding that 'the acceptances were intended to be made and were made in Texas, so the sales were Texas ones.' 539 S.W.2d 917 at 922." The Appellants' almost unbelievably state:

> THERE IS NO TESTIMONY IN THE RECORD NOW BEFORE THIS COURT

> WHICH INDICATES THAT ACCEPTANCES WERE INTENDED TO BE MADE IN TEXAS.

It is important to note that each of and every Appellants' offering sheets, which were supplied to their customers, clearly states:

> THIS AGREEMENT SHALL BE DEEMED TO HAVE BEEN MADE, NEGOTIATED, *ACCEPTED*, EXECUTED AND DELIVERED *IN THE STATE OF TEXAS* AND SHALL BE DEEMED A TEXAS CONTRACT, *SUBJECT TO THE LAWS OF TEXAS*. (emphasis added)

For Appellants to make such an assertion to this Honorable Court is, at the least, deceptive and misleading to a gross degree!

Recently, the United States Court of Appeals for the Third Circuit had before it a similar extra-territorial jurisdiction question involving the Federal Securities Act, *SEC v. Kasser*, CA 3, No. 76-1332, January 14, 1977. There the defendants argued tha the transactions, essentially foreign in nature, were not intended to fall "within the ambit of the federal antifraud legislation."

On appeal, the Third Circuit quotes with approval Judge Friendly's language in *ITT v. Vencap, Ltd.*, 519 F.2d 1001, (CA 2 1975). Judge Friendly suggested that federal jurisdiction might exist even when the fraudulent acts had no impact within the United States. In rejecting an "effect" requirement, the Court stated that it did not think Congress intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when they are peddled only to foreigners, and that the Court believed Congress meant to prohibit the SEC from policing such activities within this country.

Thus, in *Kasser*, the Federal Court held that U.S. citizens who conspire in the United States to violate the Federal Securities Act abroad are not shielded from the reach of the act's enforcement provisions. The situation before this Court is almost identical. Should Texas become a "Barbary Coast" harboring securities pirates who prey upon citizens of other states and run to refuge in the safe harbor of their home port? Appellee thinks not. To sustain Appellants argument would, as the Court in *Kasser* said, create a haven for such defrauders and manipulators.

Rio Grande, supra, spoke to the identical business situation and clearly is applicable to the case at bar--even though Cash and Heflin attempted to insulate themselves by creating several Schedule D companies rather than just "hanging out" with only one.

The court below did not err in holding that to require registration of securities sold exclusively to non-residents of Texas does not create an excessive burden on interstate commerce in violation of the interstate commerce clause of the United States Constitution and same does not present a substantial federal question for review.

APPELLEE HAS NOT APPLIED THE TEXAS SECURITIES ACT IN A MANNER WHICH VIOLATES APPELLANTS' RIGHTS OF EQUAL PROTECTION AND DUE PROCESS AS GUARANTEED BY THE CONSTITUTIONS OF THE UNITED STATES AND THE STATE OF TEXAS AND DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION FOR REVIEW.

Appellants erroneously contend that the granting of a Permanent Injunction violates their rights to equal protection and due process. Appellants argue that since injunctive relief was sought against them while

administrative redress in the nature of Cease and Desist Orders was sought against other Schedule D offerors similarly situated Appellants' were denied equal protection through application of the Texas Securities Act in an unequal manner.

Further, Appellants urge that the failure to announce publicly the implementation of more stringent enforcement of the Act against Schedule D offerors constituted a failure to provide notice to Appellants and, as such, violated their rights to due process.

These two contentions will be addressed respectively.

Appellants concede that the Act is not, on its face, violative of their equal protection or due process rights. Rather, they contend that merely seeking different remedies against similarly situated offerors constitutes discriminatory administration.

Clearly, discriminatory administration can constitute the basis for a claim of denial of equal protection. As stated by this Honorable Court, "[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."*Sunday Lake Iron Co. v. Wakefield Tp.*, 247 U.S. 350 at 350, 38 S. Ct. 495 at 495 (1918). However, the law is equally clear that it is not enough to show that a statute has not been enforced against other persons as it is sought to be enforced against the person claiming discrimination, the precise contention of Appellants herein. *Mackay Telegraph & Cable Co. v. City of Little Rock*, 250 U.S. 94, 100, 39 S. Ct. 428, 430 (1919).

In *Sunday Lake, supra*, at 495, this Court stated:

It is also clear that mere errors of judgment by

> officials will not support a claim of discrimination. There must be something more -- something which in effect amounts to an intentional violation of the essential principles of practical uniformity. The good faith of such officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party. 247 U.S. at 350, 38 S. Ct. at 495. *Accord: Mackay Telegraph & Cable Co., v. City of Little Rock, supra*, 25 U.S. at 100, 39 S. Ct. at 430-31.

As stated in *Thompson v. Spear*, 91 F.2d 430, 433-34 (5th Cir. 1937), "[t]he fact that others have violated the law with impunity is no defense. It is only where the enforcement agency is vested with a discretionary power and exercises its discretion arbitrarily and unjustly that enforcement of valid regulation becomes violative of the equal protection clause."

Finally, in the recent case of *Super X Drugs of Texas, Inc. v. Texas*, 505 S.W.2d 333 (Tex. Civ. App. - Houston [14th Dist] 1974, no writ), the Court addressed the argument by Appellants herein as follows:

> . . . The crux of this argument is that the statute is unconstitutional as applied because of selective enforcement and discrimination. We do not agree. More must be shown than mere unequal application of a state statute to prove a violation of the equal protection clause. . . It is not sufficient to show only that the law is enforced against some and not others. There must be a showing of actual and purposeful discrimination against the individual himself or against a suspect classification in which he falls (such as wealth, religion or race) with no proper justifying governmental purpose in such classification. 505 S.W.2d at 336. *Accord:*

> *Armendariz v. State*, 529 S.W.2d 525, 527 (Tex. Crim. App. 1975).

To sustain Appellants' position would require a holding that selective enforcement as to Schedule D offerors, that is, the seeking of varying remedies *authorized by Texas law* for violation of the Act, constitutes arbitrary and unjust administration -- a patently absurd contention. Speaking to the question of legislative prerogative in fashioning remedies available under the Texas antitrust statutes, this Court, in *Tigner v. Texas*, 310 U.S. 141, 148, 60 S. Ct. 879, 882 (1940), stated:

> How to effectuate policy -- the adoption of means to legitimately sought ends -- is one of the most intractable legislative problems. Whether proscribed conduct is to be deterred by qui tam action or triple damage or injunction, or by criminal prosecution, or merely by defense to actions in contract or by some, or all, of these remedies in combination *is a matter within the legislature's range of choice.* (emphasis added)

With respect to Schedule D offerors, Appellee merely selected from those remedies specifically authorized by the Texas legislature. Since varied means of redress were available, varied means of redress were employed --best suited to the circumstances of the particular case-- as is Appellees' lawful prerogative.

The analogy between the policy determinations made with respect to Schedule D offerors and the policy determinations regularly made by criminal prosecutors further illustrate the weakness of Appellants' claim. In *United States v. Dalton*, 465 F.2d 32, 35 (5th Cir. 1972), the court rejected the claim of denial of due process and equal protection on the ground that the government accepted pleas from some co-defendants and granted immunity to another without affording appellant the

same treatment. [*Accord: Overstreet v. United States*, 367 F.2d 83 (5th Cir. 1966); *Brown v. Parratt*, 419 F.Supp. 44, 48 (D. Neb. 1976).] *See also: United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) [courts are not to interfere with the exercise of discretionary powers of United States Attorneys and their control over criminal prosecution]; *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967) [two persons may have committed same legal offense, but prosecutor is not compelled by law, duty or tradition to treat them the same as to charges]

Further, as the Texas Court of Criminal Appeals squarely held in *Ex Parte Boman*, 268 S.W.2d 186 (Tex. Crim. App. 1954), "[t]he fact that a law may not be invoked against others could not in any wise affect its constitutionality because invoked against relator. As written, it is capable of uniform enforcement." 268 S.W.2d at 186. [*Accord: Ex Parte Breen*, 353 S.W.2d 233 (Tex. Crim. App. 1962); *Brundett v. State*, 354 S.W.2d 395, 396 (Tex. Crim. App. 1962)]

In sum, the choice of which of several available remedies to seek for violation of the Act, or, for that matter, the choice not to pursue any remedy in a given instance, is, and must be, a matter of prosecutorial discretion. That injunctive relief rather than administrative sanction was sought in the case now before this Court has in no way deprived Appellants of their rights of equal protection of the laws.

Appellants also contend that their rights to due process were violated because the Securities Commissioner failed to *"warn"* them of an increased enforcement effort against violators in the Schedule D business. This argument fails to recognize, however, the distinction between notice of enforcement and notice of prohibited conduct which is provided in the Act itself. The question is whether the *law itself* provided adequate warning to Appellants. Thus, the issue becomes

whether the statute withstands attack on the ground of vagueness.

As stated in *United States v. Petrillo*, 332 U.S. 1, 7, 67 S. Ct. 1538, 1542 (1947), the due process requirement is complied with by a statute whose language provides an adequate warning as to what conduct falls within its ambit, and marks boundaries sufficiently distinct for judges and juries to administer the law in accordance with the legislative will. In *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298-99 (1972), this Court addressed the inquiry as follows:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. . .

The Texas Securities Act, clear on its face, provided Appellants with more than adequate warning that their conduct was prohibited. Section 7, for example, warns that no dealer, agent, or salesman shall sell or offer for sale any security that has not been registered with the Commissioner.

Further, construction of the Act by the Attorney General of Texas *in 1941*, provides added support for the proposition that Appellants were provided adequate warning that their conduct was prohibited. And in *Brown v. Cole*, 291 S.W.2d 704, 708, (Tex. Sup. 1956), the Court noted that the terms "sale" or "offer for sale" were defined to include "every disposition or attempt to dispose of a security for value." Indeed, the Court, in

Brown, made it very clear that a "seller" may be any link in the chain of the selling process or . . . one who performs any act by which a sale is made."

Thus, the broad, clear and comprehensive nature of the Act itself, the existence of a 1941 Attorney General's Opinion directly applicable to the facts at hand, as well as the existence of judicial construction of the Act emphasizing its broad application, compel the conclusion that Appellants were *more* than adequately warned that the Act was applicable to "sales" or "offers for sale" of oil and gas interests made from Texas to non-residents.

The fact that prior to instituting an intensified enforcement effort no announcement to that effect was hand delivered to Appellants with a certificate suitable for framing is of no moment where the law itself wholly comports with the due process requirement that adequate warning of prohibited conduct be provided. All that was required of Appellants was to avail themselves of the opportunity to read the law.

The Court below did not err in holding that Appellee has not applied the Act in a manner which violates the Appellants' rights to equal protection and due process of law and, therefore, does not present a substantial federal question for review.

WHEREFORE, PREMISES CONSIDERED, Appellee prays (1) that the Court dismiss Appellants' appeal because there is not presented a substantial federal question for review; (2) that the Court affirm the judgment of the Courts below; and (3) that the Court award appellee such costs and such other and further relief as it may show itself entitled to recover.

Respectfully submitted,

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Attorney General of Texas

David Kendall

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First Assistant Attorney General

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Attorney for Appellee
The State of Texas

October 18, 1978

CERTIFICATE OF SERVICE

This is to certify that on the 18 day of October, 1978, a true and correct copy of the foregoing Motion to Dismiss or Affirm was mailed, postage prepaid, to the Honorable Earl L. Yeakel, III, 1420 Americanbank Tower, Austin, Texas 78701, Counsel for Appellants.

Bill Flanary

BILL FLANARY

APPENDIX A

OPINION OF THE TEXAS ATTORNEY GENERAL

O-3193 (1941)

OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

Gerald C. Mann
Attorney General

Honorable William J. Lawson
Secretary of State
Austin, Texas

Attention: Mr. Frank D. Wear

Dear Mr. Lawson:

Opinion No. O-3193
Re: Whether or not Western Petroleum Corporation, under the facts stated, is engaged in interstate commerce and related questions.

A request for opinion dated February 19, 1941, requested by your predecessor in office, Honorable M. O. Flowers, has been received and carefully considered by this department. We quote from said request as follows:

> "Honorable William B. Murray, attorney for the Western Petroleum Corporation, has requested this department for a ruling as to whether or not such corporation would be required to comply with either the issuer's provisions of the Texas Securities Act or the provisions as to registration of dealers and salesmen under the following state of facts:
>
> " 'Western Petroleum Corporation is a Wyoming corporation and has complied with the requirements of the Federal Securities Act of 1933 and the Federal Securities and

Exchange Act of 1934, as amended, by filing with the Commission the enclosed Schedule "D", consisting of 17 pages. The company has, and proposes to comply with all requirements of the Commission concerning reporting of sales, etc.

" 'The corporation does not propose to qualify in your state as a foreign corporation, nor do any intrastate business there, but proposes, however, to solicit offers for the purchase of royalties by resident salesmen who deduct commissions and remit the net sum with said offers, for acceptance or rejection, by the company in Wyoming.'

"The form or offer of purchase to be used by such company is enclosed herewith.

"This department would appreciate your opinion as to the following questions under the state of facts hereinabove set out:

"(1) Is such corporation under such state of facts engaged in interstate commerce?

"(2) If you have answered 'Yes' to the above question holding thereby that such corporation under such state of facts and its agents are engaged in interstate commerce would such corporation and its agents be violating the provisions of the Texas Securities Act if they have made no attempt to qualify under the issuer's provisions thereof?

"(3) If you have answered 'Yes' to the first question holding thereby that such corporation and its agents are engaged in interstate commerce would such corporation or its agents be violating the provisions of the Texas

Securities Act if they fail to register under the provisions of such Act pertaining to the registration of dealers and salesmen?"

The form or offer of purchase referred to by you is as follows:

"OFFER TO PURCHASE ROYALTY

"I, the undersigned, do hereby offer to purchase from Western Petroleum Corporation, a Wyoming corporation, a non-producing overriding royalty interest of ____ thousandth (____/10000th,) for the sum of _____ Dollars. This offer is not binding upon the corporation until accepted by its duly authorized officers in Wyoming, it being understood that this is an interstate commerce transaction. Receipt of the sum of _____ Dollars (together with a note in the sum of $_____), is hereby acknowledged. The undersigned also acknowledges receipt of a Schedule "D" relating to said non-producing overriding royalty interests.

"IN WITNESS WHEREOF, the undersigned has hereunto set his hand and seal this ____ day of _____, 194__.

"_____ _____
Salesman Name

"Accepted by:
Western Petroleum Corporation

"By _____ _____
Address"

It is well settled law that where the federal government has assumed full jurisdiction of matters within the scope of its power, its regulations are

exclusive within the field involved (See the case of Oregon-Washington R & N C. v. Washington (U.S.) 70 Law Ed. 482).

It has likewise been settled by the Supreme Court of the United States that state regulatory laws are valid unless congress has exclusively occupied the field or unless the state law directly burdens interstate commerce. (See authorities collated in opinion No. O-2459 of this department, a copy of which is enclosed herewith for your information.)

Section 77r of Title 15, U.S.C.A., a portion of the Federal Securities and Exchange Act, reads as follows:

> *"Nothing in this sub-chapter shall affect the jurisdiction of the Securities Commission (or any agency or office performing like functions) of any state or territory of the United States, or the District of Columbia, over any security or any person."* (Underscoring ours)

Judge St. Sure, of the Northern District of California, Southern Division, in construing the above quoted section, said:

> "Defendants also call attention to Sec. 18 of the Act of 1933, which provides for 'state control of securities' as indicative of the intention of Congress to limit its legislation to activities in interstate commerce. There is no merit in the contention. The most that can be said for the section is that it probably gives concurrent jurisdiction to the Securities and Exchange Commission and the State authorities. There is no doubt that the Securities and Exchange Commission has jurisdiction of the matters here complained of." Securities and Exchange Commission v. Timetrust, Inc., 28 Fed. Supp. 34.

The contention has been frequently made that "Blue Sky Laws" or "Securities Acts" impose burdens upon interstate commerce and are, therefore, unconstitutional. Such contentions were, however, rejected by the Supreme Court of the United States in the case of Hall vs. Geiger-Jones Company, 242 U.S. 539. Also see annotations in 87 A.L.R. 46 et seq.

It will be noted that the Texas Securities Act makes it *unlawful to offer for sale within the state* securities without first having secured the required license as well as to *sell within the state* without the required license. (See Section 12 of Article 600a, Vernon's Annotated Texas Civil Statutes.) The Securities Act of Michigan is similar to the Texas Securities Act. The Supreme Court of Michigan in the case of People v. Augustine, 204 N.W. 747, held that for the offense of negotiating for sale unapproved securities in Michigan the actual sale need not be consummated in Michigan. In other words the negotiations were had in Michigan and the sale was consummated in New York. The Michigan Supreme Court held this to be in violation of the Michigan Securities Act. Also see the case of First National Bank of Pineville v. Wilson, 55 S.W. (2d) 657, (Supreme Court of Kentucky).

We quote from the case of Bartlett v. Doherty, 10 F. Supp. 469, modified in some respects not material hereto in 81 F. (2d) 920, re-hearing denied 83 F. (2d) 920, certiorari denied 80 Law Ed. 1398, as follows:

> "In defendant's present brief the question is revived, it being argued that these sales of stock were New York transactions and valid under the laws of that state, and that any act of the New Hampshire Legislature which would invalidate them is unconstitutional as an undue burden on interstate commerce. It is argued that this view of the law has now been

determined by the United States Supreme Court.

"It seems to me that defendant's contention is answered by the Supreme Court in the case of Hall v. Geiger-Jones Co., 242 U.S. 539, 557, 37 S.Ct. 217, 223, 61 L.Ed. 480, L.R.A. 1917F, 514, Ann. Cas. 1917C, 643. It appears that the contention of the plaintiff now made did not escape the attention of the Supreme Court, for it said: 'The next contention of appellees is that the law under review is a burden on interstate commerce, and therefore contravenes the commerce clause of the Constitution of the United States.* * * The provisions of the law, it will be observed, apply to dispositions of securities within the state, and while information of those issued in other states and foreign countries is required to be filed, * * * *they are only affected by the requirement of a license of one who deals in them within the state.* Upon their transportation into the state there is no impediment,--no regulation of them or interference with them after they get there. There is the exaction only that he who disposes of them there shall be licensed to do so, and this only that they may not appear in false character and impose an appearance of a value which they may not possess,--*and this certainly is only an indirect burden upon them as objects of interstate commerce, if they may be regarded as such.*

" 'It is a police regulation strictly, not affecting them until there is an attempt to make disposition of them within the state. To give them more immunity than this is to give them more immunity than more tangible articles are given, they having no exemption

from regulation the purpose of which is to prevent fraud or deception. Such regulations affect interstate commerce in them only incidentally.'

" . . .

"The next claim is that 'The sales were made in New York, the New Hampshire Blue Sky Law has no extra territorial effect and therefore cannot make these sales void.' I cannot accept this statement of the law. Many of the states in the Union have enacted so-called Blue Sky laws. If defendant's statement were true, all the defendant had to do was establish his office in New York City and flood the country with securities, good or bad, and claim immunity of any breach of law of any state so long as it retained at its home office the right to confirm or reject any sale made by its agents elsewhere. *If this is true the Blue Sky Law of New Hampshire and that of most other states may as well be scrapped.* See Bothwell v. Buckbee-Mears Co., 275 U.S.274, 48 S. Ct. 124, 72 L. Ed. 277; Chattanooga National Building & Loan Association v. Denson, 189 U.S. 408, 23 S. Ct. 630, 47 L. Ed. 870." (Underscoring ours)

The above case held that the New Hampshire Blue Sky Law, regulating sales of securities within the state without prohibiting interstate shipments was not unconstitutional as an undue burden on interstate commerce as applied to sales of stock in which orders were taken in New Hampshire and confirmations were made in dealer's New York office.

Whether or not the corporation involved herein is engaged in interstate commerce is entirely immaterial in view of our further answer with respect to the local agents.

Requiring the local agents to take out permits in no way burdens the interstate business of the corporation; if it should be held that such business is interstate commerce.

While the local agents in any event would be required to comply with the requirements of our Texas Securities Act, yet, in view of the fact that the local agents in the present instance contemplate soliciting only with respect to the securities issued by this particular corporation, it would not avail them to take out permits, seeing, that under the express terms of our Securities Act, they would not thereby be authorized to offer for sale securities of a foreign corporation or solicit orders for a foreign corporation which itself had not taken out an issuer's permit.

Section 5 of our Texas Securities Act declares:

> "No dealer, agent or salesman shall sell or offer for sale any securities issued after the passage of this Act, except those which come within the classes enumerated in subdivisions (a) to (q) both inclusive, of Section 3 of this Act, or subdivisions (a) to (i), both inclusive of Section 23 of this Act, until the issuer of such securities shall have been granted a permit by the Secretary of State, and no such permit shall be granted by the Secretary of State until the issuer of such securities shall have filed with the Secretary of State a sworn statement verified under the oath of an executive officer of the issuer and attested by the Secretary thereof, setting forth the following information: * * *"

In view of the above quoted Section it is our opinion that the local agents, even with a permit, would not be authorized to offer for sale the securities mentioned in your letter, unless and until the corporation shall have

been granted an issuer's permit by the Secretary of State.

APPROVED APR 25, 1941

s/s

FIRST ASSISTANT
ATTORNEY GENERAL

Very truly yours

Attorney General of Texas

By s/s

Wm. J. Fanning
Assistant

WJF:ej

APPROVED
OPINION
COMMITTEE
By s/s
Chairman